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IN THE

Supreme Court of the United States

October Term, 1943.

No. 462.

RICHARD A. KNIGHT,

Petitioner,

AGAINST

THE BAR ASSOCIATION OF THE CITY OF NEW YORK.

Petition for Rehearing of Application for Writ of Certiorari.

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To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:

Comes now, Richard Knight and respectfully petitions this Honorable Court for a rehearing of his petition for a writ of certiorari to review the decree of the Appellate Division, First Department of the Supreme Court of the State of New York as affirmed by the Court of Appeals of the State of New York, whereby petitioner was disbarred from the practice of law in that State under an alleged authority claimed by respondent and by the said Appellate Division to be derived by it from the provisions of the New York Judiciary Law, Sections 88 and 476.

The sole charge adduced against petitioner was that he had violated a prohibition of that statute by indulging, to quote its exact words, in "conduct prejudicial to the administration of justice" by reason of the fact that *after* the termination of extensive litigation in which he had represented the interests of his wife and children as an attorney, he published derogatory statements concerning the conduct of various judges who had functioned as such in the course of that litigation. Not one of these statements, however, was charged by respondent or sought by it to be proved to have been untrue or unjustified or possibly designed by petitioner to have affected, in any way, the conduct or disposition of that litigation.

As appears from the analysis of the law and the facts set forth under Point II of petitioner's original Petition and Brief to this Court, moreover, there was, in the conduct and disposition below of the disbarment proceeding, as total a disregard, both by the Courts and by respondent, of petitioner's constitutional right of due process of law as would have been the service of a summons by telegraph or the entry of a judgment by one Court on evidence adduced before another in a case in which both, as a matter of law, were wholly without jurisdiction.

The petition was submitted to this Court under No. 462 of the October Term, 1943 and was denied by order filed December 13th, 1943.

The denial by the New York Courts in this case of petitioner's rights of free speech and free press and to due process was in such improbably blatant and insolent disregard of law and even of the crudest standards of common honesty that no other theory respecting this Court's refusal[1] to interest itself in the matter suggests itself so promptly or so satisfyingly as that that refusal

1. Unanimous, except in the person of Mr. Justice Murphy, who disagreed with the balance of its body from the start and voted for the granting of the writ sought.

is attributable simply to the Court's total incredulity or total misapprehension of the facts of the case as adduced by petitioner in his Brief and its consequent dismissal of the entire matter without further consideration.

As those facts, however, are not only incontrovertible but as, in addition, no pretense even of controverting them has been or will be resorted to by respondent, petitioner is making this application for a rehearing in the hope of fully awakening the Court's consciousness to them and thereby eliciting from it that application of the law which it, in almost its exact present personnel, has specifically and unanimously found in the *Bridges* case (314 U. S. 252) to be absolutely required by them.

I.

A writ was granted in the *Bridges* case because, in the words of Mr. Justice Black,[1] "the importance of the constitutional question prompted" it. Since the constitutional question in that case is identical with the constitutional question in this, it is difficult to believe that this Court, if only its attention can here be effectually attracted and held, will insist upon maintaining the position that the question, in fact, is not of the slightest importance and that the solemn pronouncements in the *Bridges* case of both Mr. Justice Black in the majority opinion and Mr. Justice Frankfurter in his dissenting opinion are in no way binding upon it and afford no real assurance or protection whatever to any citizen who may have relied or who may yet rely upon them.

This, nevertheless, is unquestionably the position which, by the inescapable implication of its original denial of the writ here sought, this Court currently occupies.

For wholly nugatory have been rendered by that denial, the opinions of both Mr. Justice Black and Mr. Justice

1. In the majority opinion therein.

Frankfurter and wholly meaningless have become, for practical purposes, such uncompromising phrases of Mr. Justice Frankfurter, concurred in by the Chief Justice and Mr. Justice Roberts, as the following:

> "In a series of opinions, as uncompromising as any in its history, this Court has settled that the fullest opportunities for free discussion are implicit in the concept of ordered liberty and thus through the Fourteenth Amendment protected against attempted invasion by the States. * * * The channels of inquiry and thought must be kept open to new conquests of reason however odious their expression may be to the prevailing climate of opinion."
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> * * * * * *
>
> "Of course, freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. *Particularly should this freedom be employed in comment upon the work of Courts* who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power.
>
> "Some English judges extended their authority for checking interferences with judicial business actually in hand, to 'lay by the heel' those responsible for 'scandalizing the Court,' that is, bringing it into general disrepute. *Such foolishness* has long since been disavowed in England and *has never found lodgment here.*" (Italics mine.)
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> * * * * * *
>
> "That a State may, under appropriate circumstances, prevent interference with specific exercises of the process of impartial adjudication *does not mean that its people lose the right to condemn decisions or the judges who render them.* Judges as

persons or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. * * * There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore, judges must be kept mindful of their limitations and of their ultimate public responsibility *by a vigorous stream of criticism expressed with candor however blunt.* 'A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, *any more than he can for exciting public feeling against a judge for what he already has done'.*" (Italics mine.)

* * * * * *

"Courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint and by good taste. Winds of doctrine should freely flow for the promotion of good and the correction of evil. Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen *regardless of the temper or the truth of what may be uttered.*" (Italics mine.)

* * * * * *

"A publication intended to teach the judge a * * * lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power."

* * * * * *

"If a rule of state law is not confined to the evil which may be dealt with but places an indis-

> criminate ban on public expression that operates as an overhanging threat to free discussion, it must fall without regard to the facts of the particular case. *This is true whether the rule of law be declared in a statute or in a decision of a court.*
>
> "Comment after the imposition of sentence-criticism, however unrestrained of its severity or lenience or disparity, * * * is an exercise of the right of free discussion."

In a recent decision of this Court, written by Mr. Justice Roberts and concurred in by Mr. Justice Frankfurter, appears the ominous statement:

> "The tendency to disregard precedents * * * has become so strong in this Court of late as, in my view, to shake confidence in the consistency of decision and leave the courts below on an unchartered sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow."

Mr. Justice Roberts' unqualified concurrence in the opinion of Mr. Justice Frankfurter in the *Bridges* case, considered in the light of the foregoing statement of his own, concurred in by Mr. Justice Frankfurter, makes it next to impossible to believe that when those Honorable Justices voted against granting the writ here sought by petitioner, either of them could have been aware that the facts in this case and the law necessarily applicable thereto bring it squarely within the principles laid down by Mr. Justice Frankfurter, with Mr. Justice Roberts' concurrence, in the *Bridges* case.

Among all the statements pertaining to this case contained in Mr. Justice Frankfurter's opinion and concurred in by Mr. Justice Roberts and the Chief Justice, however,

incomparably the most significant to petitioner's present argument is the succinct and unqualified apophthegm:

> "The Due Process Clause of the Fourteenth Amendment protects the right to comment on a judicial proceeding *so long as this is not done in a manner interfering with the impartial disposition of a litigation.*"

As it is conceded by the respondent in this case that the comments of petitioner on the judicial proceedings in the litigation in New York State which precipitated this matter in no way interfered or were designed to interfere or *could* have interfered with the impartial disposition of that litigation, it is difficult to imagine how Mr. Justice Frankfurter or the Chief Justice or Mr. Justice Roberts or any other member of this Honorable Court could have, in view of the last quoted statement of the law and in view of the facts of this case, failed to vote for granting the writ of certiorari here sought by the petitioner except through a complete misapprehension of those facts or a complete disbelief in the petitioner's assertion of them.

And with that misapprehension and/or disbelief dispelled by the reiteration here made of those facts, it is, of course, quite beyond imagining that those Honorable Justices will not now immediately recognize the identity between this case and the *Bridges* case and thereupon alter their original position herein accordingly so as to conform it with that taken by Mr. Justice Murphy from the beginning.

For it is beyond argument that what this Honorable Court has done in refusing the writ of certiorari here is not only to disaffirm every word in the opinions of Mr. Justice Black and Mr. Justice Frankfurter in the *Bridges* case but, in addition, specifically to confirm the preposterous position taken by the Association of the Bar of

the City of New York that, the Fourteenth Amendment to the contrary notwithstanding, no lawyer in America may comment, either by word of mouth or in print, upon the conduct or determination of any Court in this country without incurring the possible penalty of being summarily disbarred for such comment *irrespective of any question of its truth or justifiability.*

As lawyers are obviously better qualified than any other class of the populace to comment intelligently on the conduct and determinations of judges and as they are certainly the most likely class to have occasion to do so, the denial by this Court of the writ here sought is tantamount to a complete insulation by it of all the Courts in this country against any derogatory comment of a professionally informed character whatever.

It is, of course, not conceivable that this Court contemplated any such absurd result as this from its failure to grant the writ here.

But even if it did, it would still be unthinkable that it would undertake to make so immeasurably drastic an exception to the principles laid down in the *Bridges* case and its long and perfectly consistent tale of forerunners without carefully setting forth, in a considered opinion, its reasons for doing so.

For a determination of such momentous and incalculable consequences should manifestly not be the product of what Mr. Justice Frankfurter has called a "careful silence".

II.

For as complete an analysis as petitioner is capable of making for his claim that his right to due process was disregarded in this matter by the Courts below, this Court is hereby referred to the discussion under Point II in petitioner's original brief.

The Court's attention is also directed, in this connection, to the fact, emphasized in Point III of petitioner's original brief that, in the total absence of a suggestion of proof or *even a charge* in the record submitted herein to the Appellate Division, First Department, that a single word published by petitioner was either false, malicious or otherwise unjustified, its Presiding Justice, Francis Martin, the fin de siecle ward-heeler who, among the gang of other biddable jackals currently composing that Court, effortlessly stands out as obtrusively as a dog-tick among mice-lice, unhesitatingly "found" in the "decision" he concocted in this proceeding that petitioner's publications were "malicious" and "false" and designed to "coerce" judges from the "fearless discharge of their duties" in a matter that, to this common liar's personal knowledge, had been judicially disposed of *months before* the drafting of the first of petitioner's publications!

That the conception of the due process is wholly irreconcilable with so incredible and impudent and pimp-shameless a display of deliberate dishonesty by a judge of a Court purporting to be controlled by that conception requires no pointing out here.

WHEREFORE, your petitioner prays that his petition for a writ of certiorari may be reheard and reconsidered.

And your petitioner will ever pray.

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